

No. 10523

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United States

13

Circuit Court of Appeals

For the Ninth Circuit.

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W. S. D. SMITH,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

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Transcript of Record

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Upon Appeal from the District Court of the United States  
for the Western District of Washington  
Northern Division

FILED

SEP - 8 1943

PAUL P. O'BRIEN,  
CLERK



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United States  
Circuit Court of Appeals  
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF COUNSEL

MESSRS. CHARLES P. MORIARTY and STAN-  
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1212 American Bldg.,  
Seattle, Washington.

Attorneys for Appellant.

MESSRS. J. CHARLES DENNIS and GERALD  
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1012 U. S. Court House,  
Seattle, Washington.

Attorneys for Appellee. [1\*]

United States District Court, Western District of  
Washington, Northern Division

No. 343

UNITED STATES OF AMERICA,

Plaintiff,

vs.

W. S. D. SMITH,

Defendant.

### COMPLAINT

Come now J. Charles Dennis, United States Attorney for the Western District of Washington, and G. D. Hile, Assistant United States Attorney for said district, and on behalf of the United States of America make the following allegations for cause of action.

#### I.

That the defendant W. S. D. Smith is now a resident of Seattle, King County, Washington, within the Northern Division of the Western District of Washington.

#### II.

That on April 25, 1924, the district Court of the United States of America for the Southern District of the Southern Division, at Los Angeles, California, having jurisdiction of the said defendant W. S. D. Smith, and of the crime charged in the Indictment below referred to, duly and regularly imposed judgment and sentence against the said defendant W. S. D. Smith on all three counts of



an Indictment in cause number 6310 of said Court. That the said defendant W. S. D. Smith was sentenced by said Court to imprisonment for a period of two years on each of the three counts of said Indictment, said terms of imprisonment to run concurrently and said defendant was further sentenced to pay a fine to the United States on said Count I in the sum of \$10,000.00 and further to pay a fine to the United States of \$1.00 on each of said Counts II and III of said Indictment. Said Count I charged said defendant W. S. D. Smith, [2] and others, with conspiracy to violate Section 593 of the Tariff Act of 1922 (42 Stat. 982). Count II of said Indictment charged the defendant W. S. D. Smith with a violation of Section 593 of the Tariff Act of 1922 (42 Stat. 982); and Count III charged said defendant W. S. D. Smith with a violation of Sections 593 and 813 of the Tariff Act of 1922. That an appeal by the said defendant W. S. D. Smith from said judgment was affirmed by the United States Circuit Court of Appeals for the Ninth Circuit on March 15, 1926, by virtue of a mandate filed and spread of record on March 18, 1926, in said cause number 6310.

### III.

That the defendant has failed, neglected and refused to pay said fine or any part thereof and that by virtue thereof said defendant is indebted to the United States in the amount of \$10,002.00.

Wherefore, plaintiff prays judgment against the defendant W. S. D. Smith in the sum of Ten Thou-

sand Two and no/100 Dollars (\$10,002.00), and for plaintiff's taxable costs and disbursements herein, and for such other and further relief as to the Court may seem just and equitable.

J. CHARLES DENNIS,  
United States Attorney.

G. D. HILE,  
Assistant United States At-  
torney.

[Endorsed]: Filed April 1, 1921. [3]

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[Title of District Court and Cause.]

### AMENDED ANSWER

Comes Now the defendant and for amended answer to the complaint of the plaintiff, admits, denies and alleges as follows:

#### I.

Answering Paragraph I, plaintiff admits the same.

#### II.

Answering Paragraph II, plaintiff admits that he was convicted and fined, but denies each and every other allegation therein contained.

#### III.

Answering Paragraph III, plaintiff denies the same.

For Further Answer and by way of a first affirmative defense, defendant alleges:

I.

That because of the repeal of the National Prohibition Act, said fine has no effect.

For Further Answer and by way of a second affirmative defense, defendant alleges:

I.

That the United States is barred from the enforcement of [6] the claim by the statute of limitations and by the laws of California and the laws of Washington.

For Further Answer and by way of a third affirmative defense, defendant alleges:

I.

That the defendant executed a pauper's oath and under the terms of the sentence was relieved of any liability for said fine.

Wherefore defendant prays that plaintiff's complaint be dismissed and that it take nothing thereby, and that defendant have his costs and disbursements herein to be taxed.

CHARLES R. MORIARTY,  
STANLEY J. PADDEN,  
Attorneys for Defendant.

State of Washington,  
County of King—ss.

W. S. D. Smith, being first duly sworn, on oath deposes and says: That he is the above named defendant; that he has read the foregoing Amended

Answer, knows the contents thereof and believes the same to be true.

W. S. D. SMITH.

Subscribed and sworn to before me this 25 day of March, 1943.

CHARLES P. MORIARTY,  
Notary Public in and for the State of Washington,  
Residing at Seattle.

Received a copy of the within Amended Answer this 25 day of Mar., 1943. J. Charles Dennis, Attorney for Pltf.

[Endorsed]: Filed Mar. 25, 1943. [7]

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[Title of District Court and Cause.]

#### AGREED STATEMENT OF FACTS

Comes now the United States of America by and through J. Charles Dennis, United States Attorney for the Western District of Washington, and G. D. Hile, Assistant United States Attorney for said District, and Stanley J. Padden and Charles P. Moriarty, attorneys for the defendant W. S. D. Smith, and stipulate that the following shall be deemed an Agreed Statement of Facts in the above entitled cause:

#### I.

The defendant W. S. D. Smith while a resident of the State of California with others was indicted by the Grand Jury of the United States District Court of the Southern District of California on

February 29th, 1924. A copy of said indictment is attached hereto and made a part of this Agreed Statement of Facts.

## II.

To each count of the indictment the defendant W. S. D. Smith entered a plea of not guilty. Thereafter a trial was had, and the defendant W. S. D. Smith was convicted on the conspiracy count and all the other counts of the indictment. Thereafter, on April 25th, 1924, said W. S. D. Smith was sentenced, a copy of the sentence being attached hereto and made a part of this Agreed Statement of Facts.

[8]

## III.

The defendant W. S. D. Smith served two years at the United States Penitentiary at Leavenworth, Kansas, and after completion of his sentence the defendant W. S. D. Smith being without funds, was unable to pay the fine of \$10,000.00. That thereafter he executed the pauper's oath and served an additional thirty days, and was discharged from the penitentiary upon the termination of said thirty day period.

## IV.

Thereafter an execution issued on said sentence imposing a fine of \$10,000.00 on Count I of the indictment, and a \$1.00 fine on each of the other counts of the indictment, said execution being issued from the District Court of the United States for the Southern District of the District of California, and from such execution the sum of \$51.35 was realized thereon, and no more. That outside of

said sum of \$51.35 realized from the garnishment proceedings above, no further sums have been paid by the defendant W. S. D. Smith to apply upon said fines.

V.

With the exception of the aforesaid judgment, no other execution has been issued and no further proceedings have been had until the filing of the above entitled action in this Court. In the year 1928 the defendant W. S. D. Smith migrated to Seattle, Washington from California and entered business under his own name in the City of Seattle, County of King, State of Washington, and is now a resident of the City of Seattle, within the Western District of the Northern Division of Washington. It is hereby [9]

Stipulated between the parties that any of the statutes of the State of Washington, or the statutes of the State of California, or the decisions of those states may be presented to the Court for consideration by the Court without being specifically pleaded. It is further

Stipulated that copies of the proceedings in Cause No. 6310 of the United States District Court for the Southern Division (now Central Division) of the Southern District of California, certified to be true and correct by the Clerk of said Court, may be admitted in evidence and be given the same force and effect as if they were originals. It is further

Stipulated between the parties hereto that the plaintiff in this action has no evidence that the defendant W. S. D. Smith had any funds at the

time of his release under the pauper's oath, and has not and does not charge that he concealed or withheld any funds or property from the execution of the judgment. It is further

Stipulated between the parties hereto that in the event the Court overrules the contentions of the defendant W. S. D. Smith on the merits that all questions regarding the issuance of, or validity of the issuance of, the issuance of garnishments and attachments and the imposition of the judgment are herein reserved for later hearing by the Court upon the merits, and the right of the United States of America to the remedy of enforcement by execution, garnishment and attachment upon the judgment sued upon is reserved for hearing after the Court has decided the above entitled cause upon this Agreed Statement of Facts.

J. CHARLES DENNIS,  
United States Attorney.

G. D. HILE,  
Assistant United States At-  
torney. [10]

CHARLES P. MORIARTY,  
STANLEY J. PADDEN,  
Attorneys for Defendant. [11]

No.....

Filed.....

Viol: Sec. 37 Federal Penal Code—Conspiracy to violate the Tariff Act of 1922 and Sections 593 and 813 of the Tariff Act of 1922.

## INDICTMENT

[Title of District Court.]

At a stated term of said Court, begun and holden at the City of Los Angeles, County of Los Angeles, within and for the Southern Division of the Southern District of California, on the second Monday of January, in the year of our Lord one thousand nine hundred and twenty-four:

The Grand Jurors of the United States of America, chosen, selected and sworn, within and for the Division and District aforesaid, on their oaths present:

That Francis C. Neal, W. S. D. Smith, Anna Neal, F. Carlton, H. E. F. Greenwald, Nick Zanetich, Frank Oreb, Tom Dusevich, James Yubanni and William Morrison, hereinafter called the defendants, whose full and true names are, and the full and true name of each of whom is, other than as herein stated, to the Grand Jurors unknown, each late of the Southern Division of the Southern District of California, heretofore, to-wit: on or about the 16th day of January, A. D. 1924, at or near the City of Los Angeles, County of Los Angeles, within the state, division and district aforesaid, and within the jurisdiction of the United States and of this Honorable Court, did knowingly, willfully, unlawfully, [12] corruptly, fraudulently and feloni-



ously conspire, combine, confederate and agree together and with various and divers other persons to the Grand Jurors unknown, to commit offenses against the United States, to-wit: the offense of knowingly, willfully, unlawfully and feloniously smuggling and clandestinely introducing into the United States certain merchandise on which there are duties imposed by law, and which should be invoiced, with intent to defraud the revenue of the United States, to-wit: about one thousand and fifty (1050) gallons of spirituous liquors more particularly described as follows, to-wit: about seven hundred and fifty (750) gallons of alcohol and about three hundred (300) gallons of whiskey, on which there is a duty of Five (\$5.00) Dollars per proof gallon imposed by law; and other quantities of spirituous liquors and wines, the exact amounts thereof being to the Grand Jurors unknown, without invoicing said merchandise and without paying the said duties thereon and without making provision for the payment of the said duties; in violation of Section 593 of the Tariff Act of 1922: and

The crime of knowingly, willfully, unlawfully and feloniously receiving, concealing, selling and facilitating the sale, transportation and concealment of the hereinbefore described merchandise, which said merchandise prior thereto had been imported into the United States contrary to law, that is to say, the said defendants would knowingly, wilfully, unlawfully and feloniously receive, conceal, sell and facilitate the sale, transportation and concealment of the said merchandise, after the same had been

smuggled and clandestinely introduced into the United States *into the United States* in the gasoline power boat Erni, from a point without the boundaries of the United States, to-wit: the town of Mazatlan in the Republic of Mexico, without any permit being issued therefor, [13] under the provisions of the National Prohibition Act to so import the said merchandise and without having been invoiced and without having the duties thereon paid, and without any provisions having been made for the payment of said duties, said defendants well knowing that the said merchandise had been so imported contrary to law, in violation of the provisions of Section 593 of the Tariff Act of 1922;

The said conspiracy, combination, confederation and agreement was continuously throughout all of the times in this Indictment mentioned, and up to the time of the filing of this Indictment, in operation and existence. [14]

#### Overt Act. No. 1

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

That thereafter, in furtherance of the said conspiracy and to effect the object thereof, and on or about the 10th day of February, A. D. 1924, the said defendant Francis C. Neal drove in a certain Cadillac roadster automobile to a point near the City of Santa Monica, County of Los Angeles, within the state, division and district aforesaid, and within the jurisdiction of the United States and of this honorable court, the said point being near the entrance to the Malibu ranch.

Overt Act No. 2

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

That thereafter, in furtherance of the said conspiracy, and to effect the object thereof, and on or about the 11th day of February, A. D. 1924, the said defendants, Francis C. Neal, W. S. D. Smith, and F. Carlton proceeded in a certain Essex roadster automobile to the Malibu Pier, near the city of Santa Monica, County of Los Angeles, within the state, division and district aforesaid, and within the jurisdiction of the United States and of this Honorable Court;

Overt Act No. 3

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

That thereafter, in furtherance of the said conspiracy and to effect the object thereof, and on or about the 11th day of February, A. D., 1924, the said defendants, Anna Neal turned off and on the lights of a certain Cadillac automobile, at a point within the Malibu Ranch, near the City of Santa Monica, County of Los Angeles, within the state, division and district aforesaid, and within the jurisdiction of the United States [15] and of this Honorable Court.

Overt Act No. 4

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

That thereafter, in furtherance of the said conspiracy and to effect the object thereof, and on or about the 11th day of February, A. D. 1924, the

said defendant William Morrison proceeded to a point near the Malibu Ranch near the City of Santa Monica, County of Los Angeles, within the state, division and district aforesaid, and within the jurisdiction of the United States and of this Honorable Court.

#### Overt Act No. 5

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

That thereafter, in furtherance of the said conspiracy and to effect the object thereof, and on or about the 11th day of February, A. D. 1924, the said defendant William Morrison, proceeded from the said point near the Malibu Ranch to the top of a rise of ground, within the boundaries of the Malibu Ranch, near the City of Santa Monica, County of Los Angeles, within the state, division and district aforesaid, and within the jurisdiction of the United States and of this Honorable Court.

#### Overt Act No. 6

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

That thereafter, in furtherance of the said conspiracy and to effect the object thereof, and on or about the 25th day of January, A. D. 1924, the said defendants, Frank Oreb, Nick Zanetich, H. E. F. Greenwald, Tom Dusevich and James Yubanni proceeded from Mazatlan within the Republic of Mexico to a point within the jurisdiction of the United States, at or near [16] Santa Monica, County of Los Angeles, within the state, division and district

aforesaid, and within the jurisdiction of the United States and of this Honorable Court.

Overt Act No. 7

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

That thereafter, in furtherance of the said conspiracy and to effect the object thereof, and on or about the 11th day of February, A. D. 1924, the said defendants, Frank Oreb, Nick Zanetich, H. E. F. Greenwald, Tom Dusevich and James Yubanni proceeded, on board the gasolene power boat Erni to the Malibu Pier, near the City of Santa Monica, County of Los Angeles, within the state, division and district aforesaid, and within the jurisdiction of the United States and of this Honorable Court.

Overt Act No. 8

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

That thereafter, in furtherance of the said conspiracy and to effect the object thereof, and on or about the 11th day of February, A. D. 1924, the said defendants, Francis C. Neal, W. S. D. Smith, F. Carlton, H. E. F. Greenwald, Nick Zanetich, Frank Oreb, Tom Dusevich and James Yubanni, unloaded from the gasolene power boat Erni about two hundred and thirty (230) gallons of whiskey onto the said Malibu Pier located near the City of Santa Monica, County of Los Angeles, within the state, division and district aforesaid, and within the jurisdiction of the United States and of this Honorable Court. [17]

## Overt Act No. 9

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

That thereafter, in furtherance of the said conspiracy and to effect the object thereof, and on or about the 11th day of February, A. D. 1924, the said defendant Frank Oreb climbed from the said gasoline power boat Erni to the Malibu Pier, which said pier is located near the City of Santa Monica, County of Los Angeles, within the state, division and district aforesaid, and within the jurisdiction of the United States and of this Honorable Court.

## Overt Act No. 10

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

That thereafter, in furtherance of the said conspiracy and to effect the object thereof, and on or about the 11th day of February, A. D. 1924 the said defendants, W. S. D. Smith, H. E. F. Greenwald, Nick Zanetich, Tom Dusevich and James Yubanni attempted to put to sea aboard the gasoline power boat Erni from a point near the Malibu pier near the City of Santa Monica, County of Los Angeles, within the state, division and district aforesaid, and within the jurisdiction of the United States and of this Honorable Court.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America. [18]

## SECOND COUNT

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

That Francis C. Neal, W. S. D. Smith, Anna Neal, F. Carlton, H. E. F. Greenwald, Nick Zanetich, Frank Oreb, Tom Dusevich, James Yubanni and William Morrison, hereinafter called the defendants, whose full and true names are, and the full and true names of each of whom is, other than as herein stated, to the Grand Jurors unknown, each late of the Southern Division of the Southern District of California, heretofore, to-wit: on or about the 11th day of February, A. D. 1924 at the Malibu Pier, near the City of Santa Monica, County of Los Angeles, within the state, division and district aforesaid, and within the jurisdiction of the United States and of this Honorable Court, did knowingly, willfully, unlawfully and feloniously and with intent to defraud the revenues of the United States, smuggle and clandestinely bring into the United States from the Republic of Mexico, certain goods, wares and merchandise, to-wit: spirituous liquors more fully described as follows, to-wit: about one thousand and fifty (1050) gallons of spirituous liquors more particularly described as follows, to-wit: about seven hundred and fifty (750) gallons of alcohol and about three hundred (300) gallons of whiskey, on which there is a duty of Five (\$5.00) Dollars per proof gallon imposed by law, and which said spirituous liquors were then and there subject to said duty by law; which said spirituous liquors should have been invoiced, [19]

without then and there paying or accounting for said duty or any part thereof, and without having said distilled spirits or any part thereof invoiced; in violation of Section 593 of the Tariff Act of 1922;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America. [20]

### THIRD COUNT

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further *persent*:

That Francis C. Neal, W. S. D. Smith, Anna Neal, F. Carlton, H. E. F. Greenwald, Nick Zanetich, Frank Oreb, Tom Dusevich, James Yubanni and William Morrison, hereinafter called the defendants, whose full and true names are, and the full and true name of each of whom is, other than as herein stated, to the Grand Jurors unknown, each late of the Southern Division of the Southern District of California, heretofore, to-wit: on or about the 11th day of February, A. D. 1924, at the Malibu Pier, near the City of Santa Monica, County of Los Angeles, within the state, division and district aforesaid, and within the jurisdiction of the United States and of this Honorable Court, did knowingly, willfully, unlawfully and feloniously and for beverage purposes and contrary to law, smuggle and clandestinely bring, import and introduce into the United States to-wit: the State of California, at the County of Los Angeles, and within the jurisdiction of this Honorable Court, from a foreign



country, to-wit: the Republic of Mexico, certain goods, wares and merchandise, to-wit: spirituous liquors more fully described as follows: to-wit: about one thousand and fifty (1050) gallons of spirituous liquors more particularly described as follows, to-wit: about seven hundred and fifty (750) gallons of alcohol and about three hundred (300) gallons of whiskey, on which there is a duty of Five (\$5.00) Dollars per proof gallon imposed by law, said spirituous liquors then and there containing [21] alcohol in excess of one-half of one per cent by volume, the importation of which said distilled spirits into the United States was then and there forbidden except on a permit issued therefor by the Commissioner of Internal Revenue of the United States, without having first obtained a permit from the said Commissioner of Internal Revenue of the United States to import and bring the said spirituous liquors into the United States, that is to say, the said defendants did knowingly, wilfully, unlawfully and feloniously and without first obtaining a permit from the Commissioner of Internal Revenue of the United States, transport and clandestinely smuggle, carry and convey the said *the said* quantity of spirituous liquors on board the gasoline power boat Erni across the International Boundary Line from the Republic of Mexico into the United States at a point near the City of Santa Monica, County of Los Angeles, within the state, division and district aforesaid, in violation of Sections 593 and 813 of the Tariff Act of 1922;

Contrary to the form of the statute in such case

made and provided, and against the peace and dignity of the United States of America.

JOSEPH C. BURKE

United States Attorney

(s) MARK L. HERRON

Assistant United States Attorney. [22]

(Cover Page)

No. 6310 M

United States District Court  
Southern District of California

THE UNITED STATES OF AMERICA,

vs.

FRANCIS C. NEAL, et al.

INDICTMENT

Viol: Sec. 37 F.P.C. Consp. to viol. Tariff Act of 1922 and Secs. 593 and 813 of Tariff Act of 1922.

A TRUE BILL

/s/ R. W. RICHMAN (?)

Foreman

Presented and filed in open Court, this .....day of Feb 29 1924 A.D. 190

CHAS. N. WILLIAMS,  
Clerk

By ..... ? .....Deputy Clerk  
F. C. Neal and W.D.S. Smith \$20,000 ea  
Anna Neal \$2,500  
All other Defts \$5,000 ea. [23]

At a stated term, to wit: The January Term, A. D. 1924 of the District Court of the United States of America, within and for the Southern Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 17th day of March in the year of Our Lord one thousand nine hundred and twenty four.

Present:

The Honorable Paul J. McCormick District Judge.

No. 6310-T Crim. S. D.

[Title of Cause.]

This cause coming on at this time for arraignment and plea of all defendants herein except James Yubanni; Mark L. Herron, Assistant United States Attorney, appearing as counsel for the Government; all of the above entitled defendants being present except F. Carlton who is a fugitive from justice and James Yubanni; and defendants who are present being represented by Mack Meader, Esq. and said defendants having been called, waive the reading of the Indictment and state their names to be as given therein, and, upon being required to plead, all defendants who are present interpose their separate pleas of not guilty, and Mack Meader, Esq. having thereupon asked that this cause be transferred to Judge Bledsoe's Department for trial for April 8th, 1924 and that this cause be continued to said date for arraignment and plea of

defendant James Yubanni, Mack Meader, Esq. appearing for said defendant James Yubanni, at this time, it is by the court ordered that this cause be transferred to Judge Bledsoe's Department for trial of said defendants for April 8th, 1924 and for the arraignment and plea of defendant James Yubanni for said time. [24]

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No. 6310-T-B-Cr.

[Title of District Court and Cause.]

We, the Jury in the above entitled cause, find the defendant, Francis C. Neal, Guilty, as charged in the First Count of the Indictment, and Guilty as charged in the Second Count of the Indictment, and Guilty, as charged in the Third Count of the Indictment; and the defendant, W. S. D. Smith, Guilty, as charged in the First Count of the Indictment, and Guilty, as charged in the Second Count of the Indictment, and Guilty as charged in the Third Count of the Indictment; and the defendant, Anna Neal, Guilty, as charged in the First Count of the Indictment, and Not Guilty as charged in the Second Count of the Indictment, and Not Guilty, as charged in the Third Count of the Indictment; and the defendant, H. E. F. Greenwald, Guilty, as charged in the First Count of the Indictment, *and Guilty*, and Guilty as charged in the Second Count of the Indictment, and Guilty, as charged in the Third Count of the Indictment; and the defendant, Nick Zanetich, Guilty, as charged in the First Count of the Indictment, and Guilty

as charged in the Second Count of the Indictment, and *Guilty*, Guilty, as charged in the third Count of the Indictment; and the defendant, Frank Oreb, Guilty, as charged in the First Count of the Indictment, and Guilty, as charged in the Second Count of the Indictment, and Guilty, as charged in the Third Count of the Indictment; and the defendant Tom Dusevich, Guilty, as charged in the First Count of the Indictment, and Guilty, as charged in the Second Count of the Indictment, and Guilty, as charged in the Third Count of the Indictment; and the defendant, William Morrison, Not Guilty, as charged in the First Count of the Indictment, and Not Guilty, as charged in the Second Count of the Indictment, and Not Guilty, as charged in the Third [25] Count of the Indictment.

Los Angeles, California, April 22, 1924.

/s/ ELLWOOD DeGARMO,  
Foreman.

Filed: April 22, 1924.

CHAS. N. WILLIAMS,  
Clerk.

/s/ EDMUND L. SMITH,  
Deputy. [26]

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At a stated term, to wit: The January Term, A. D. 1924 of the District Court of the United States of America, within and for the Southern Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Friday the 25th day of April in the year of

Our Lord one thousand nine hundred and twenty four.

Present:

The Honorable Benjamin F. Bledsoe, District Judge.

No. 6310-B Crim. S. D.

[Title of Cause.]

This cause coming before the court at this time for sentence of defendants Francis C. Neal, Anna Neal, W. S. D. Smith, Frank Oreb, H. E. F. Greenwald, Nick Zanetich and Tom Dusevich; Mark L. Herron, Esq. Assistant United States Attorney, appearing as counsel for the Government, defendants Francis C. Neal and Anna Neal being present in court with their attorneys, C. B. Morton, Esq. and Wm. J. Clark, Esq.; defendants W. S. D. Smith, H. E. F. Greenwald, Nick Zanetich, Frank Oreb and Tom Dusevich being present in court with their attorney Mack Meader, Esq.; J. E. Noon being also present in court in his official capacity as stenographic reporter of the testimony and proceedings, Wm. J. Clark, Esq. presents a motion for a new trial and Mack Meader, Esq. having thereupon presented a motion for a new trial on behalf of their clients, without argument, it is by the court ordered that said motions for a new trial be and they are hereby overruled, and exceptions having thereupon been entered to the overruling of said motions on behalf of the defendants, Mark L. Herron, Esq. makes a statement to the court on

behalf of the Government, and Wm. J. Clark, Esq. having thereupon made a statement to the court on behalf of defendants Francis C. Neal and Anna Neal, the court now pronounces sentence upon defendants for the crime of which [27] they now stand convicted, namely, violation of Section 37 Federal Penal Code, conspiracy to violate Tariff Act of 1922 *and Tariff Act of 1922*, and it is the judgment of the court that the defendant W. S. D. Smith be imprisoned in the United States Penitentiary at Leavenworth, Kansas, for the term and period of two years on each count of the Indictment, said terms of imprisonment to begin and run concurrently, and to pay a fine unto the United States in the sum of \$10,000.00 on the first count of the Indictment and stand committed to the said United States Penitentiary until said fine shall have been paid, and to pay a fine of \$1.00 on each of the second and third counts, respectively; and that the defendant Frank Oreb be imprisoned in the United States Penitentiary at Leavenworth, Kansas, for the term and period of two years on each count of the Indictment, said terms of imprisonment to be *ing* and run concurrently, and to pay a fine in the sum of \$1000.00 on the first count of the Indictment, and stand committed to said United States Penitentiary until said fine shall have been paid, and to pay a fine of \$1.00 on each of the second and third counts, respectively; and that the defendant Francis C. Neal, be imprisoned in the United States Penitentiary at Leavenworth, Kansas, for the term and period *for* fifteen months on each count of the

Indictment, said terms of imprisonment to begin and run concurrently, and to pay a fine in the sum of \$100.00 on the first count of the Indictment, and stand committed to said United States Penitentiary until said fine shall have been paid, and pay a fine of \$1.00 on each of the second and third counts, respectively; and that the defendant Anna Neal pay a fine in the sum of \$1.00; that the defendant H. E. F. Greenwald be imprisoned in the United States Penitentiary at Leavenworth, Kansas, for the term and period of eighteen months on each count of the Indictment, said terms of imprisonment to begin and run concurrently, and pay a fine in the sum of \$1000.00 on the first count of the Indictment and stand committed to the said United States Penitentiary until said fine shall have been paid, and to pay a fine in the [28] sum of \$1.00 on each of the second and third counts, respectively; and that defendant Nick Zanetich be imprisoned in the United States Penitentiary at Leavenworth, Kansas, for the term and period of eighteen months on each count of the Indictment, said terms of imprisonment to begin and run concurrently, and pay a fine in the sum of \$1000.00 on the first count of the Indictment and stand committed to the said United States Penitentiary until said fine shall have been paid, and to pay a fine in the sum of \$1.00 on each of the second and third counts, respectively; and that defendant Tom Dusevich be imprisoned in the United States Penitentiary at Leavenworth, Kansas, for the term and period of eighteen months on each count of the Indictment, said terms of im-



prisonment to begin and run concurrently, and pay a fine in the sum of \$1000.00 on the first count of the Indictment and stand committed to the said United States Penitentiary until said fine shall have been paid, and to pay a fine in the sum of \$1.00 on each of the second and third counts, respectively; and that said defendants be remanded to the custody of the United States Marshal. [29]

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United States of America—ss.

The President of the United States of America,  
To the Honorable the Judges of the District  
Court of the United States for the Southern  
District of California, Southern Division

Greeting:

Whereas, lately in the District Court of the United States for the Southern District of California, Southern Division before you, or some of you, in a cause between United States of America, Plaintiff, and Francis C. Neal; W. S. D. Smith; Anna Neal; F. Carlton (fugitive); H. E. Greenwald; Nick Zanetich, Frank Oreb; Tom Dusevich; James Yribane, charged as James Yubanni and William Morrison, Defendants, No. 6310-T (b) Crim. S. D. a Judgment was duly entered on the 25th day of April, A. D. 1924; which said Judgment is of record and fully set out in the office of the Clerk of the said District Court, to which record reference is hereby made and the same is hereby expressly made a part hereof, and [30] as by the inspection of the Transcript of the Record.....

of the said District Court, which was brought into the United States Circuit Court of Appeals for the Ninth Circuit by virtue of a writ of error prosecuted by W. S .D. Smith, H. E. F. Greenwald, Nick Zametich, Frank Oreb and Tom Dusevich, as Plaintiffs in Error, against United States of America, as Defendant in Error.....

agrecably to the Act of Congress.....  
 in such cases made and provided, fully and at large appears: .....

And Whereas, on the 24th day of November in the year of our Lord One Thousand Nine Hundred and twenty-five the said cause.....  
 came on to be heard before the said Circuit Court of Appeals, on the said.....  
 Transcript of the Record and was duly argued and submitted: .....

[31]

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is affirmed.

(December 14, 1925.)

You, Therefore, Are Hereby Commanded

That such further proceedings be had in the said cause .....

as according to right and justice and the laws of the United States ought to be had, the said writ of

error as to Plaintiffs in Error, Smith, Greenwald, Zanetich and Lusevich, notwithstanding.

Witness, the Honorable William H. Taft, Chief Justice of the United States, the 15th day of March, in the year of our Lord One Thousand Nine Hundred and twenty-six and of the Independence of the United States of America the One Hundred and fiftieth.

F. D. MONCKTON,

Clerk of the United States  
Circuit Court of Appeals  
for the Ninth Circuit.

By /s/ PAUL P. O'BRIEN,  
Deputy Clerk.

[Endorsed]: Filed March 30, 1943. [32]

United States Circuit Court of Appeals for the  
Ninth Circuit

No. 4471

SMITH, et al.,

vs.

UNITED STATES OF AMERICA.

MANDATE

As to Smith, Greenwald, Zanetich and Lusevich

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No. 6310—B Crim.

U. S. District Court

Southern District of California

UNITED STATES OF AMERICA

vs.

FRANCIS C. NEAL, W. S. D. SMITH, et al.

[Endorsed]: Filed Mar. 18, 1926. Chas. N. Williams, Clerk. [33]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 343

UNITED STATES OF AMERICA,  
Plaintiff,

vs.

W. S. D. SMITH,  
Defendant.

FINDINGS OF FACT AND CONCLUSIONS  
OF LAW

This cause coming on regularly for hearing on the 12th day of May, 1943, the plaintiff being represented by J. Charles Dennis, United States Attorney for the Western District of Washington, the defendant being represented by Stanley J. Padden and Charles P. Moriarty, an agreed statement of facts having been stipulated by both the plaintiff and the defendant, a trial having been held on the merits, and the Court, in accordance with the stipulation as filed, finds the following facts:

FINDINGS OF FACT

I.

That the defendant W. S. D. Smith, while a resident of the State of California, was indicted by the Grand Jury of the United States District Court for the Southern District of California on February 29th, 1924. That the indictment consisted of

three counts, Count I being a conspiracy count, Count II being a violation of Sec. 593 of the Tariff Act of 1922, Count III being a violation of Secs. 593 and 813 of the Tariff Act of 1922.

## II.

That to each count of the indictment the defendant W. S. D. Smith entered a plea of not guilty. Thereafter a trial was had, and [34] the defendant W. S. D. Smith was convicted on the conspiracy count and all the other counts of the indictment. That thereafter on April 25, 1924, W. S. D. Smith was duly and regularly sentenced, the sentence providing that the defendant W. S. D. Smith serve two years at the United States Penitentiary at Leavenworth, Kansas, and pay a fine of \$10,000.00 imposed on the conspiracy count, and a fine of \$1.00 on each of the other counts of the indictment. That the said W. S. D. Smith served two years in the United States Penitentiary at Leavenworth, Kansas; and after completion of his sentence, being without funds and unable to pay the fine of \$10,000.00, he duly and regularly executed the pauper's oath and served an additional thirty days, and was discharged from the penitentiary upon the termination of said thirty day period.

## III.

That thereafter an execution issued on said judgment and sentence imposing a fine of \$10,000.00 on Count I of the indictment, and a fine of \$1.00 on each of the other counts of the indictment, said

execution being issued from the District Court of the United States for the Southern District of California, and from such execution the sum of \$51.35 was realized thereon, and no more. That save and except the said sum of \$51.35 realized from the garnishment proceedings above, no further sums have been paid by the defendant W. S. D. Smith to apply upon said fine.

#### IV.

That with the exception of the aforesaid execution, no further execution has been issued and no further proceedings were held until the filing of the above entitled action in this Court. In the year 1928 the defendant W. S. D. Smith migrated to Seattle, Washington from California and entered business under his own name [35] in the City of Seattle, County of King, State of Washington, and is now, and was at the commencement of this action, a resident of the City of Seattle, within the Northern Division of the Western District of Washington.

Done in open Court this 31 day of May, 1943.

JOHN C. BOWEN,

United States District Judge.

And as Conclusions of Law from the foregoing Findings of Fact, the Court finds the following:

#### CONCLUSIONS OF LAW

##### I.

That this Court has jurisdiction over the defendant W. S. D. Smith and the cause of action.

## II.

That there is due and owing from the defendant W. S. D. Smith to the United States of America \$9950.65, being the balance due of the fine imposed by the District Court of the United States for the Southern District of California on April 25th, 1924.

## III.

That this action was instituted for the purpose of obtaining judgment in this District based upon the judgment as heretofore rendered in the Southern District of California as aforesaid, and the Court finds that following the decisions of the Supreme Court of the United States in the case of *Custer v. McCutcheon*, 283 U. S., at pg. 514, and the case of *Schodde, et al, v. United States*, 69 Fed. (2d), at pg. 866, that the plaintiff is entitled to judgment for said amount above named.

Done in open Court this 31 day of May, 1943.

JOHN C. BOWEN,

United States District udge.

[36]

Presented by:

J. CHARLES DENNIS,

United States Attorney.

Approved as to form only:

STANLEY J. PADDEN,

CHARLES P. MORIARTY.

[Endorsed]: Filed May 31, 1943. [37]



In the District Court of the United States for the  
Western District of Washington, Northern Di-  
vision.

No. 343

UNITED STATES OF AMERICA,

Plaintiff,

vs.

W. S. D. SMITH,

Defendant.

### JUDGMENT

This cause coming on regularly for hearing in open Court this 31st day of May, A. D. 1943, the plaintiff being represented by J. Charles Dennis, United States Attorney for the Western District of Washington, the defendant W. S. D. Smith being represented by Stanley J. Padden and Charles P. Moriarty, his attorneys, the trial of the action having been held upon the merits, the Court having signed Findings of Fact and Conclusions of Law based thereon, now, therefore, it is hereby

Ordered, Adjudged and Decreed that the plaintiff United States of America do have and recover from the defendant W. S. D. Smith the sum of Nine Thousand Nine Hundred Fifty Dollars and Sixty-five cents (\$9950.65), together with the costs of this action.

Done in open Court this 31st day of May, 1943.

JOHN C. BOWEN,

United States District Judge.

Presented by:

J. CHARLES DENNIS,

United States Attorney.

Approved: as to form only:

CHARLES P. MORIARTY,

STANLEY J. PADDEN,

Attorney for Defendant.

[Endorsed]: Filed May 31, 1943. [38]

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[Title of District Court and Cause.]

### NOTICE OF APPEAL

Notice is hereby given that W. S. D. Smith, defendant above names, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on May 31, 1943.

CHARLES P. MORIARTY

STANLEY J. PADDEN

Attorneys for Appellant

W. S. D. Smith.

Received a copy of the within Notice of Appeal this 8th day of July 1943.

J. CHARLES DENNIS,

Attorneys for U. S.

[Endorsed]: Filed July 8, 1943 [39]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT  
OF RECORD ON APPEAL

I, Judson W. Shorett, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the foregoing type-written transcript of record, consisting of pages *number* from 1 to 45 inclusive, is a full, true and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as is required by the designation of the record on appeal filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court at Seattle, and that the same constitute the record on appeal herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that no exhibits are shown of record as having been offered or admitted at the trial of the above entitled cause.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office for making record, certificate of return to the United States Circuit Court of Appeals for the Ninth Circuit, to wit:



In the United States Circuit Court of Appeals  
For the Ninth Circuit

No. 10523

UNITED STATES OF AMERICA,  
Plaintiff and *Appellee*,

vs.

W. S. D. SMITH,  
Defendant and Appellant.

### STIPULATION

It Is Hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the parts of the record necessary to be printed for consideration of the points on appeal by the court are the following:

The complaint, original certified record page 2.

The amended answer, the original certified record page 6.

The agreed statement of facts with the exhibits attached thereto, original certified record page 8.

The findings of fact and conclusions of law, original certified record page 34.

The judgment, original certified record page 38.

Notice of appeal, original certified record page 39.

And it is hereby agreed that these documents may constitute the record on appeal and the other documents consisting of the

Answer, original certified record page 4.

Cost Bond on appeal, original certified record page 40.

A designation and the context of the record, original certified record page 45.

need not be printed.

This stipulation is made pursuant to rule 19 (CCA9) and it is agreed between the attorneys for the respective parties that the printing of any other records are not necessary for the consideration by the court, but agree that either party may supplement the record if such are deemed necessary for consideration.

CHARLES P. MORIARTY

STANLEY J. PADDEN

Attorneys for Appellant

J. CHARLES DENNIS

Attorney for *Appelle*

[Endorsed]: Filed Aug 13, 1943

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[Title of Circuit Court of Appeals and Cause.]

STATEMENT OF POINTS RELIED UPON BY  
THE APPELLANT

The following is the statement of points on which the appellant intends to rely on their appeal from that certain judgment entered by the United States District Court for the Western District of Washington against W. S. D. Smith.

I.

The court erred in finding that the judgment

entered April 25, 1924, in the U. S. District Court of California was a valid and subsisting judgment at the time of the commencement of this action and a valid and subsisting judgment on April 1, 1941 at time of the commencement of this action.

## II.

The court erred in making the following conclusions of law:

1. Holding it had jurisdiction over the defendant and cause of action.

2. Court erred in making conclusions of law #2 that W. S. D. Smith was indebted to the United States of America in the sum of \$9950.65, on account of the judgment entered April 25, 1924.

The court erred in Conclusion of law that the cases of *Custer vs. McCutcheon* 283 U. S. page 514 and the case of *Schodde et al vs. the United States* 69 Fed. (2) page 866 were applicable to the Cause of Action and entitled the plaintiff the right to judgment against the defendant.

## III.

That District Court erred in failing to apply the Statute of Limitations Title 28, U. S. C. A., Section 791, reading as follows:

“No suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States, shall be maintained, except in cases where it is otherwise specially provided, unless the same is commenced within five years from the time when the penalty or for-

feiture accrued \* \* \*.”

and in holding that the fine was not a penalty under wording of the Statute.

#### IV.

The court erred in failing to hold rule 30 of the local rules of the United States District Court for the Western District of Washington was applicable to the cause of action and covered by the Statutes of the State of Washington, to-wit:

“Except where regulated by Acts of Congress or the Federal Rules of Civil Procedure, the party recovering judgment in any cause in the District Court shall be entitled to similar remedies upon the same by execution, or otherwise, to reach the property of the judgment debtors as are provided at the time in like causes by the laws of the State of Washington; and the State laws in relation to executions, sales, exemptions, rights of purchasers, rights of judgment creditors, and judgment debtors, redemptions, liens of judgments and proceedings supplementary to such proceedings, existing at the time the remedy is sought, subject to the Acts of Congress and said Federal Rules of Civil Procedure, are adopted as rules of this court; and the United States Marshal of this District shall conform his proceedings thereto.”



## V.

The court erred in failing to apply the following U. S. Statute to the Cause of Action.

“Section 1621. Limitation of actions.—No suit or action to recover any pecuniary penalty or forfeiture of property accruing under the customs laws shall be instituted unless such suit or action is commenced within five years after the time when the alleged offence was discovered: Provided, That the time of the absence from the United States of the person subject to such penalty or forfeiture, or of any concealment or absence of the property, shall not be reckoned within this period of limitation. (June 17, 1930, c. 497, Title IV, §621, 46 Stat. 758; Aug. 5, 1935, c. 438, Title III, §306, 49 Stat. 527.)”

## VI.

The court erred in failing to apply the California Statutes of Limitation to the Cause of Action of the plaintiff.

## VII.

The court erred in failing to apply the Washington Statutes of Limitation to the Cause of Action of the plaintiff.

## VIII.

The court erred in ruling that the fine was not a penalty under the Statute and the District court erred in entering judgment against W. S. D. Smith in the sum of \$9950.65 together with costs of the

action and in entering any judgment against W. S. D. Smith at all.

CHARLES P. MORIARTY  
STANLEY J. PADDEN  
Attorneys for Appellant

Received a copy of the within Statement of Points  
this 10th day of Aug. 1943.

J. CHARLES DENNIS  
Attorney for U. S.

[Endorsed]: Filed Aug. 13, 1943.